UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

AAA TRANSPORTATION/YELLOW CAB
Employer

and Case 28-RC-106979

TUCSON HACKS ASSOCIATION
Petitioner

ORDER

The Employer's Request for Review of the Regional Director's Supplemental Decision and Direction of Election is denied as it raises no substantial issues warranting review.[1]

MARK GASTON PEARCE, CHAIRMAN

KENT Y. HIROZAWA, MEMBER

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[1] In agreeing with the Regional Director's finding that the extent of employer control factor weighs in favor of employee status, we rely, in addition to the factors specifically cited in his analysis, on the evidence set forth on pp. 14-15 of the decision, including lease termination for "rapid metering" or a pattern of misconduct, the requirement of defensive driving courses for speeding violations, and the prohibitions on transporting nonpaying individuals along with customers and on tipping cashiers.

We reject the dissent's suggestion that we must grant review in order to further explicate the Regional Director's treatment of the inference, discussed in *Metro Cab Co.,* 341 NLRB 722, 724 (2004), that when a driver pays an employer a fixed rental fee and retains all fares that she collects without accounting for those fares, the employer control element of the common law agency test weighs in favor of independent contractor status. As illustrated by *Metro Cab* itself, this inference is not conclusive; there, the Board concluded that the inference was overcome by the strength of other evidence. Id. at 724-725. In the present case, although the Regional Director may have inartfully chosen his words in stating that this inference "does not squarely apply," it is clear that he was simply finding that contrary evidence overcame the inference.

Likewise, with regard to the dissent's second argument for granting review, we indeed disavow reliance on the Regional Director's references to "economic realities" and "economic dependence." However, these scattered references do not negate the ample evidence, cited in the Regional Director's decision, establishing that the drivers were statutory employees.

Member Miscimarra, dissenting:

Contrary to my colleagues, I would grant the Employer's request for review because I believe the Employer's request and the Regional Director's analysis raise substantial issues warranting review. First, the Regional Director found, contrary to Board precedent, that "the inference of independent contractor status for drivers who pay a fixed lease rate regardless of earnings does not squarely apply here." Second, at several points in his decision, the Regional Director referred to the "economic realities" of the drivers' relationship with the Employer and the "economic dependency" that drivers have on the Employer. In *FedEx Home Delivery*, 361 NLRB No. 55, slip op. at 16 (2014), the majority, in response to Member Johnson's dissent, flatly rejected the "economic realities" test endorsed by the Supreme Court in *NLRB v. Hearst Publications*, 322 U.S. 111 (1944), and subsequently rejected by Congress in the Taft-Hartley Act of 1947. The Regional Director appears to have relied, at least in part, on this long-abandoned standard for determining independent contractor status.[2] For these reasons, I believe the Regional Director's decision gives rise to substantial issues that make it inappropriate to deny review.[3]

1. *The Regional Director's Treatment of the Fixed Lease Rate*. As the Regional Director notes, the Board's analysis of independent contractor status with respect to taxicab, limousine, and similar types of drivers places significant weight on (1) the relationship between the company's revenue and the amount of fares the driver collects, and (2) the control exerted by the company over the manner and means by which drivers conduct business after leaving the company's garage. See, e.g., *AAA Cab Services*, 341 NLRB 462, 465 (2004); *Elite Limousine Plus*, 324 NLRB 992, 1001-1002 (1997). In considering these factors, the Board has further held that when a driver pays an employer a fixed rental and retains all fares he collects without accounting for those fares, "there is a strong inference that the [e]mployer does not exert control over the means and manner of his performance." *Metro Cab Co.*, 341 NLRB 722, 724 (2004); see also *City Cab Co. of Orlando*, 285 NLRB 1191 (1987). Thus, a flat fee "is evidence of an independent contractor relationship because it places on the drivers a strong incentive to maximize their trips since, once the flat fee is recouped, income is largely profit; in addition, a flat fee insulates a cab company from variations in income because regardless of the drivers' earnings, the company receives the same amount from the drivers." *Yellow Cab Co.*, 312 NLRB 142, 144 (1993).

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[2] Although I did not participate in *FedEx,* I agree with former Member Johnson's criticism of the majority's analysis of "employee" and "independent contractor" issues. See *Browning-Ferris Industries of California d/b/a BFI Newby Island Recycling*, 362 NLRB No. 186, slip op. at 26 fn. 24 (2015).

[3] The majority disclaims reliance on the Regional Director's treatment of "economic realities," but this warrants *granting* review to ensure that the record and applicable legal principles support the Regional Director's conclusion. It bears emphasis that the Board here is not passing on the merits of the Regional Director's findings. Rather, by denying review, the Board is leaving intact the Regional Director's conclusions without engaging in an independent review of the case.

It is undisputed that the drivers at issue here pay a flat fee to lease their taxi cabs from the Employer for a specific term. Most drivers have weekly leases. Moreover, the Regional Director states that drivers are not required to provide the Employer with an accounting of their trips and revenue for cash and credit calls. Yet, despite the clear and long-held precedent cited above, the Regional Director concluded that the "strong inference" that the Employer's drivers are independent contractors as a result of the flat fee arrangement "does not squarely apply here." The Regional Director cites to several factors that, in his view, mitigate the significance of the flat fee lease payment. For example, he notes, among other things, that the Employer can adjust lease rates to ensure drivers are earning at a certain rate. In addition, the Regional Director finds that the Employer sometimes adjusts meter rates, the amount paid to drivers for voucher rates, and the types of leases available to drivers. The Employer disputes many of these findings. But even if the Regional Director's findings are supported by the record, the Board, in my view, has a responsibility to determine whether those facts are sufficient to negate the strong inference of independent contractor status created by the flat fee lease arrangement. For this reason alone, I would grant review.

2. *The Regional Director's Reliance on "Economic Realities" and "Economic Dependence."* The Regional Director's analysis appears to rely on the "economic realities" of the relationship between the Employer and drivers and on the drivers' "economic dependency" on the Employer. As fully explained in his dissent in *FedEx Home Delivery,* supra, slip op. at 21, former Member Johnson cites "clear Congressional intent that the Board must apply the common-law agency test in determining the scope of the independent-contractor exemption, and that it do so in a way that does not reflect the more expansive and specifically rejected 'economic realities' or 'economic dependence' test" (citing *NLRB v. United Insurance Co. of America*, 390 U.S. 254, 256 (1968)). Indeed, as noted above, the majority in *FedEx* acknowledges that Congress rejected the "then-prevailing 'economic realities' test" when it adopted the Taft-Hartley Act of 1947. 361 NLRB No. 55, slip op. at 16.

The Regional Director, however, begins his analysis by stating, "[I]n making this decision . . . I have carefully considered the economic realities of the relationship between the Employer and its taxicab drivers in applying that precedent [involving taxicab drivers]." When discussing the Employer's adjustments to its leasing plan, the Regional Director states, "These practices increase to almost totality the economic dependency that drivers have on the Employer." These statements appear to contradict 69 years of precedent, as well as the majority's acknowledgement in *FedEx* that the Board's analysis of independent contractor status must not consider "economic realities" or "economic dependency." For this reason as well, I believe the Board should grant review in the instant case.

Accordingly, I respectfully dissent.

PHILIP A. MISCIMARRA, MEMBER

Dated, Washington, D.C., June 29, 2016.